



May 20, 1999

Mr. Greg Buckley
Childress County Attorney
Courthouse, Box 3
Childress, Texas 79201

OR99-1402

Dear Mr. Buckley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124259.

The County of Childress (the "county") received requests for information related to the conduct of a terminated county employee. You have provided the responsive information to this office for review. You contend that this information is excepted from public disclosure because it relates to anticipated litigation, thereby raising Government Code section 552.103(a). You also contend that a portion of this information is excepted from public disclosure because it is an investigation file of a criminal nature and that the release of the file would interfere with detection or investigation of a crime, thereby raising Government Code section 552.108. We have reviewed the submitted documents and considered the exceptions to disclosure raised by your arguments.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). The mere chance of litigation will not establish the applicability of the litigation exception. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that

litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and where a potential party threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). You state that the county is not currently named in a lawsuit, but that it “may become a party.” You have shown no steps that a potential adverse party has taken toward litigation. We conclude that you have not demonstrated that litigation is pending or reasonably anticipated. The information is therefore not excepted from disclosure by section 552.103 of the Government Code.

Section 552.108 of the Government Code, the “law enforcement exception,” provides:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [public disclosure] if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [public disclosure] if: (1) release of the internal record or notation would interfere with law enforcement or prosecution; (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or (3) the internal record or notation: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from [public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov’t Code § 552.108. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law

enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this case, you state that the investigation that is the subject of the incident report you seek to withhold did not result in the filing of criminal charges. You assert, without elaboration, that the release of this report would interfere with detection or investigation of a crime. The report does not, on its face, support your assertion. We conclude that you have not demonstrated how the release of these files would interfere with the detection, investigation, or prosecution of crime. Therefore, the incident report is not excepted from disclosure by section 552.108 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. The Public Information Act prohibits the release of confidential information. Government Code section 552.352. Because release of confidential information constitutes a misdemeanor, the attorney general will raise section 552.101 on behalf of a governmental body, although the attorney general will ordinarily not raise an exception that a governmental body has failed to claim. Open Records Decision 455 at 3 (1987). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Based on *Ellen*, a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim. We note that the common-law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance. See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Therefore, the identity of the alleged offender may not be withheld from the requestor. We have marked the submitted documents to indicate the information that is protected by common-law privacy. That information must be withheld, under section 552.101 of the Government Code.

The submitted documents also contain information that may be excepted from public disclosure by section 552.117 of the Government Code, which reads in relevant part:

Information is excepted from the [public disclosure] requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

- (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;
- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024;

Section 552.117(1) requires you to withhold information pertaining to a current or former employee or official who requested that this information be kept confidential under section 552.024. Information may not be withheld under 552.117(1) if the current or former employee elected non-disclosure after this request for information was made. Open Records Decision No. 622 (1994). Section 552.117(2) requires you to withhold information pertaining to a peace officer, without regard to that officer's election under section 552.024. We have marked the submitted documents to indicate the information that is or may be subject to section 552.117.

All information other than that which has been marked as excepted from disclosure must be released. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Jay Burns".

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 124259

encl. Submitted documents

cc: Mr. David Stevens
Amarillo Globe-News
P.O. Box 2091
Amarillo, Texas 79166
(w/o enclosures)

Mr. Christopher Blackburn
Childress Index
226 Main Street North
Childress, Texas 79201
(w/o enclosures)

Mr. Hanaba Munn Noack
Times Record News
1301 Lamar Street
Wichita Falls, Texas 76307
(w/o enclosures)